Discipline of Students with Disabilities and IAES Presented by David M. Richards Richards Lindsay & Martín, LLP 13091 Pond Springs Rd., Ste 300 Austin, Texas 78729 Copyright 2013. All Rights Reserved Housekeeping • Focus of the materials is a combination of: - Foundation of MDR as nondiscrimination mechanism - Common concerns expressed by educators (especially principals) about IDEA rules - Rules and U.S. Department of Education (ED) commentary on discipline, MDR, and IAES - Citations to ED commentary to the 2006 IDEA regulations are to 71 Fed. Register No. 156. They will read "Commentary, p. _ 2 Housekeeping • Not all IDEA discipline rules and procedures are addressed in these materials. • These materials focus on federal law. Consult state law as well, and talk to your school attorney about specific • These materials are not legal advice, but information about the law. 3

	An important source referenced for the	
	behavior pieces	
	RTI and Behavior: A Guide to Integrating	
	Behavioral and Academic Supports,	
	 By Jeffrey Sprague, Clayton R. Cook, Diana Browning Wright, and Carol Sadler, LRP 	
	Publications (2008).	
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	Understanding the Modern Campus Behavior & Discipline Dynamic	
	Benavier a Bissipiine Bynamie	
	The inevitable tension between two important	
	campus concerns: - The desire for a safe and ordered learning	
	environment	
	 IDEA's requirement of a Free Appropriate Public Education. 	
	a Things have changed including the impact	
	Things have changed including the impact of removals.	
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	Understanding the Modern Campus	
	Behavior & Discipline Dynamic	
	What happens when the campus' behavior management and disciplinary approaches	
	ignore modern dynamics?	
	Disciplinary techniques (like removals) are less	
	effective or even counter-productive - Academics are negatively impacted	
	- Academics are negatively impacted	
	Some common foundational questions	

Question 1: Why is discipline of students with disabilities different? · Congressional finding in the IDEA • The essence of discrimination: denial of access to education due to disability - Disability can cause misbehavior - Misbehavior can result in removal from school - Without careful application of discipline rules, disability can result in removal from school 7 Question 1: Why is discipline of students with disabilities different? • Consider the Supreme Court's analysis striking down the death penalty for intellectually disabled convicts in Atkins v. Virginia, 536 U.S. 304 (2002). - Equal discipline is not necessarily fair discipline - Disability means some consequences may not be appropriate. 8 Question 1: Why is discipline of students with disabilities different? "There is no evidence that [intellectually disabled individuals] are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and in group settings they are followers rather than leaders." "Their deficiencies do not warrant an exemption from

criminal sanctions, but they do diminish their personal culpability." (emphasis and bracket language added)

Question 2: Why don't students with disabilities face consequences? • This is frustration talking.... • Just because the administrator's preferred consequence may be off the table does not mean that a consequence is impossible. • IDEA does not assume that the behavior is always related, that why we do MDR. 10 Question 3: Why does sped always tell me no? • This is also frustration talking... - If I can't send him home, what do I do? - What do I tell the teachers? The victim's parents? • How can special ed help the campus to improve the student's behavior? - Look at behavioral supports as you do academic supports - IDEA's second concern (next slide) 11 Question 3: Why does sped always tell me no? "Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs." Daniel R.R. v. State Board of Education, 874 F. 2d 1036, 1038 (5th Cir. 1989).

Question 3: Why does sped always tell me no? • Are non-removal alternatives available? - Think outside the box (or bus) • An important problem: campus administrators are sometimes more sympathetic and patient with academic problems that arise from disability than behavior problems. 13 RTI & Behavior "Schools that use office referrals, out-ofschool suspension, and expulsion — without a comprehensive system that teaches positive and expected behaviors and rewards the same — are shown to actually have higher rates of problem behavior and academic failure." RTI & Behavior, p. 1 (emphasis added). Some quick thoughts on behavioral interventions.... • You can't just focus on punishment - Removals alone result in higher rates of truancy, vandalism and fighting. - This is not an evidenced-based practice! - Long-term relief requires replacement behaviors, social skills training and other evidence-based practices 15

Question 4: What is a disciplinary removal? • When school personnel take a student away from his normal setting for discipline reasons. - Most common example? Student suspended from school and sent home. 16 Question 5: What is a short-term disciplinary removal? • A short-term disciplinary removal occurs when school personnel take a student away from his normal setting for disciplinary reasons for a period of less than 10 days. 17 Question 5: What is a short-term disciplinary removal? • What about In School Suspension (ISS)? - ED Commentary about ISS. ISS days don't count as removal days if: • Child continues to participate in regular curriculum • Continues to receive services specified on IEP • Participates with nondisabled kids to same extent as their IEP placement. Commentary, p. 18

L	Question 5: What is a short-term disciplinary removal?	
	 Partial Day Suspensions Must be part of tracking system 	
	 Practical Problem: At what point does the suspension count? 	
	Bus Suspension	
19	 Counts if transportation is on student's IEP AND no alternate transport is provided by district. Commentary, p. 46715. 	
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L	Question 6: What is a long-term	
	disciplinary removal?	
	A long-term removal is one of over 10 consecutive school days, usually in the form	
	of a removal to an interim alternative education setting (IAES) or expulsion (to an	
	IAES).	
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L	Question 7: Shouldn't somebody be	
	tracking the removal days?	
	Yes, not only keeping track but also calling	
	for IEP Meetings as necessary to address needed changes in the IEP.	
	 Note that Hearing Officers don't appreciate campuses that focus on removal as opposed to improving behavior. 	
21	to improving behavior.	

Question 8: A disciplinary removal is not the same as a change in placement? • Unless it's a long-term removal (that's a change in placement), the answer depends.... • The pattern of exclusion rule was created to address the problem of short removals becoming substitutes for long removals. (Next slide) 22 Question 8: A disciplinary removal is not the same as a change in placement? • Some additional thought on the short-term removal "it is important for purposes of school safety and order to preserve the authority that school personnel have to be able to remove a child for a discipline infraction for a short period of time, even though the child already may have been removed for more than 10 school days in that school year, as long as the pattern of removals does not itself constitute a change in placement of the child." Commentary, p. 46715. 23 Question 8: A disciplinary removal is not the same as a change in placement? • The commentary clarifies that the authority conferred upon schools would not allow "using repeated disciplinary removals of 10 school days or less as means of avoiding the change in placement options in §300.536." *Commentary, p. 46715.*

 Ultimately, ED's concern is that "discipline must not be used as a means of disconnecting a child with a

disability from education." Id.

Question 9: A disciplinary removal is not the same as a change in placement? • 300.546(a)(2): Did a pattern of exclusion occur? - (i) the series of removals total more than 10 school days in a school year; - (ii) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 25 Question 10: Schools have 10 "free" days per student per school year? • Yes, 10 removal days without a required IEP Team meeting, FBA, MDR, educational services or any other IDEA requirement. • Of course, that's probably not the smartest way to use the 10 days.... 26 Question 11: What's the deal with "substantial similarity of behaviors" in a series? • The rule at 300.536(a)(2)(ii) is very subjective (making the pattern of exclusion harder to determine correctly). • It also can create an odd, unintended result for students with multiple impairments and disparate behaviors.... 27

Question 12: When do you conduct an MDR for short-term removals? • No certainty in determining when a pattern of exclusion occurs. • Consider MDR prior to the 11th day of cumulative removals, and prior to each removal thereafter. - Warning case: WayPoint Academy (MI), 55 IDELR 24 (OCR MI. 2009)(Pattern of exclusion found on 11th day of cumulative removals) 28 Question 13: When do you conduct an MDR for a long-term removal? • As soon as possible after the long-term disciplinary removal is initiated, and prior to the 10th school day after "any decision to change the placement of a child with a disability because of violation of the code of student conduct..." 300.530(e). • Note this requirement has been interpreted to mean that MDR must occur prior to the 11th day of the long-term removal. *Orlando C. v. Ysleta ISD*, 34 IDELR 172 (W.D. TX. 2001), aff'd, 103 LRP 29822 (5th Cir. 2001). 29 Question 14: Does the 2004 change in MDR standard affect my school? • MDR is easer for school to satisfy than in the past. - Attenuated relationships to disability are not

enough (think self esteem)

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(not whether IEP is appropriate).

Direct result of LEA's failure to implement the IEP

Question 15: Does the 2004 change in MDR standard affect my school? • The MDR questions: - "If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or - If the conduct in question was the direct result of the local educational agency's failure to implement the IEP." 300.530(e)(1)(i)-(ii). 31 Question 16: Who conducts the MDR? • The LEA, Parent and "Relevant members of the child's IEP Team" - "as determined by the parent and the LEA." • This can be the source of dispute. • Why not just have IEP Team do it? 32 Question 17: What happens when the behavior is related? • The IEP team is to "return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan." 300.530(f) • No long-term or additional short-term removal is possible absent a 45-day special consideration.

	Question 18: What happens when the	
	behavior is NOT related?	
	The student can be subjected to regular	
	disciplinary procedures and regular	
	removals, as in the case of a similarly situated nondisabled student.	
	citation horidicabled citations.	
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	Question 19: Special consideration for drugs,	
I_{\Box}	weapons or serious bodily injury?	
	a 45 aphael day ramayala ara passible	
	 45 school-day removals are possible regardless of MDR outcome due to certain 	
	weapon, drug, and serious bodily injury	
	offenses. 300.530(g).	
	Note the 2004 change from calendar days	
	to school days.	
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	Question 20: Do students have to be IDEA-	
	eligible to get MDR?	
	Not if the LEA had knowledge that the	
	student is a child with a disability before the	
	behavior that precipitated the disciplinary	
	action occurred. 300.534.	
	• And Section 504 kids set MDD also S.4	
	 And Section 504 kids get MDR also. S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), cert. 	
36	den'd, 102 S.Ct. 566, 454 U.S. 1030.	

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	Question 21: How does a pending IDEA evaluation impact an MDR?	
	 Can a school simultaneously argue that it has sufficient data to conduct MDR, but needs data to fulfill other functions (eligibility 	
	or services)? See, for example, Quincy (WA) School District No. 144-101, 52 IDELR 170 (OCR 2009).	
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	Overtion 22, IDEA Heaving Officer leaks at	
	Question 22: IDEA Hearing Officer looks at whether Code of Conduct was violated? Yes	
	"Because the hearing officer's authority includes a determination regarding 34 CFR § 300.530	
	and that provision includes references to removal from the current placement of a child with a disability who violates a code of student	
	conduct, there may be instances where a hearing officer, in his discretion, would address	
38	whether such a violation has occurred." Letter to Ramirez, 60 IDELR 230 (OSEP 2012).	
	Question 22: IDEA Hearing Officer looks at whether Code of Conduct was violated? Yes	
	"The IDEA and its implementing regulations neither preclude nor require that a hearing officer determine whether a certain action by	
	a student with a disability amounts to a violation of the school district's Student Code	
	of Conduct." Id.	
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Question 23: When are services required during disciplinary removals? • On the 11 th day of removal and every removal day thereafter: "After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section." 300.530(a)(2). 40 Question 23: When are services required during disciplinary removals? • On the 11 th day of removal and every removal day thereafter: "Beginning, however, on the eleventh cumulative day in a school year that a child with a disability is removed from the child's current placement, and for any subsequent removals, educational services must be provided to the extent required in § 300.530(d), while the removal continues." Commentary, p. 46717.
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☐ Question 23: When are services required
during disciplinary removals?
Any requirement to provide services prior to the
11th day of removal? Think nondiscrimination.
"A public agency is only required to provide services
during periods of removal to a child with a disability
who has been removed from his or her current placement for 10 school days or less in that school
year, if it provides services to a child without disabilities
who is similarly removed." 300.530(d)(3).
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	Question 23: When are services required during disciplinary removals?	
	Does the services requirement depend on whether the behavior is related to disability or not?	
	 No. The triggering fact is the 11th day of removal. Services are required whether the behavior is related or not. 	
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	Question 24: Who decides the location for	
	services if the removal is a change of placement?	
	s 200 524 Data mainstian of patting	
	§ 300.531 Determination of setting. The child's IEP Team determines the interim	
	alternative educational setting for services under:	
	 § 300.530(c): long term removal (>10 days) § 300.530 (d)(5): removal is change of placement 	
44	- § 300.530 (g): 45 school day special circumstances	
	I	
	Question 25: Who decides services if the removal	
	is a change of placement?	
	• § 300.530(d)(5) Services.	
	- "If the removal is a change of placement under 300.356, the child's IEP Team determines	
	appropriate services"	
	If the removal is not a change in placement,	
45	and services are required? (next slide)	

Question 26: Who decides services if the removal is NOT a change of placement? 200.530(d)(4). • Note: 10 removal days have already been used, so services must be provided: "After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under \$500.505, exhering public searchers, determine the extent to which services are needed, as provided in § 300.101(a)(1). 46 Question 27: Where does the school provide services required during removals? • Services may be provided in an interim alternative education setting (IAES), 300.530(d)(2). • The regs provide no definition of IAES, but we are given a description of what the IAES needs to do. Those requirements are discussed below. 47 Question 27: Where does the school provide services required during removals? • "Question continues are a services of the school provide services required during removals? • "Question continues an appropriate IAES will depend on the circumstances of each individual case. An IAES must be selected as as to enable the child to continue to participate in the general education progress continues and properties and the procedures, 52 (Destroirs & Answers on Discipline Procedures, 52 (Destroires & Answers on Description Procedures			
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his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.508, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a)[,]" Question 27: Where does the school provide services required during removals? • Services may be provided in an interim alternative education setting (IAES), 300.530(d)(2). • The regs provide no definition of IAES, but we are given a description of what the IAES needs to do. Those requirements are discussed below. 47 Question 27: Where does the school provide services required during removals? • "Question Environments are discussed below. 47 Answer: What constitutes an appropriate IAES will depend on the circumstances of each individual case. An IAES must be selected so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." Questions & Answers on Discipline Procedures, 52 (DELR 231 (OSERS 2009).			
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Questions & Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009).		curriculum, although in another setting, and to progress	
		Questions & Answers on Discipline Procedures, 52	
	48		

	Question 27: Where does the school provide services required during removals? • "While the Act does not specify the alternative setting"	
49	in which educational services must be provided, the Act is clear that the determination of an appropriate alternative educational setting must be selected 'so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." Commentary to 300.530, p. 46722.	
	Question 27: Where does the school provide services required during removals?	
	What type of settings are we talking about	
	While no list is provided in the regs, case law and ED Commentary recognizes the following as potential IAES:	
	 an alternative school or campus an alternative classroom, perhaps at another campus 	
50	 the Student's home A public library, or other public place 	
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	Question 27: Where does the school provide services required during removals?	
	"Question C-2: May a public agency offer 'home instruction' as the sole IAES option?	
	Answer: Noit would be inappropriate for a public agency to limit an IEP Team to only one option when determining the appropriate IAES." Questions & Answers on Discipline Procedures,	
51	52 IDELR 231 (OSERS 2009).	

L	Question 27: Where does the school provide services required during removals?	
	Ban the home as possible IAES? No. ED wrote:	
	"Whether a child's home would be an appropriate	
	interim alternative educational setting under §300.530 would depend on the particular circumstances of an individual case such as the	
	length of the removal, the extent to which the child previously has been removed from his or her regular	
52	placement, and the child's individual needs and educational goals." Commentary, p. 46722.	
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	Question 27: Where does the school	
	provide services required during removals?	
	"care must be taken to ensure that if home instruction is provided for a child removed under §	
	300.530, the services that are provided will satisfy the requirements for services for a removal under	
	§300.530(d) and section 615(k)(1)(D) of the Act. We do not believe, however, that it is appropriate to	
	include in the regulations that a child's home is not a suitable placement setting for an interim alternative educational setting as suggested by the commenter."	
53	Commentary, p. 46722.	
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	Occasion 97, Mileson de casiles a les al	
	Question 27: Where does the school provide services required during removals?	
	"the Act gives the IEP Team the responsibility	
	of determining the alternative setting and we believe the IEP Team must have the flexibility	
	to make the setting determination based on the circumstances and the child's individual	
	needs." Commentary, p. 46722.	
54		

-	Question 27: Where does the school	
	provide services required during removals?	
	"Question A-1: When the parent(s) of a child and the	
	school personnel are in agreement about the child's	
	change of placement after the child has violated a code	
	of student conduct, is it considered to be a removal	
	under the discipline provisions?	
	Answer: No, if the parent(s) of a child and the school	
	district agree to a specific change in the current educational placement of the child." Questions &	
	Answers on Discipline Procedures, 52 IDELR	
55	231(OSERS 2009).	
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	Overstion 20: What level of comics on	
'-	Question 28: What level of services are	
	required at the IAES?	
	An interesting change with IDEA 2004	
	OLD language: the services provided must "enable	
	the child to meet the goals" of the student's IEP.	
	 NEW language: the services provided enable the 	
	student "to progress toward meeting the goals set	
	out in the child's IEP." Comparing old §1415(k)(3)	
	(B)(i) to new §1415(k)(1)(D)(i).	
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	Question 28: What level of services are	
	required at the IAES?	
$ \neg$	· · · · · · · · · · · · · · · · · · ·	_
	• 300.530(d) Services.	
	(i) "educational services, as provided in §300.101(a),	
	so as to enable the child to continue to participate in the general education curriculum, although in another	
	setting, and to progress toward meeting the goals set	
	out in the child's IEP; and	
	(ii)as appropriate, a functional behavioral	
	assessment, and behavioral intervention services and	
	modifications, that are designed to address the	

	Question 28: What level of services are	
	required at the IAES?	
	 Is the school required to replicate the student's entire IEP in IAES? No. 	
	chare let in thes. No.	
	"We caution that we do not interpret 'participate' to mean	
	that a school or district must replicate every aspect of the services that a child would receive if in his or her	
	normal classroom." 71 Fed. Reg. No. 156, p. 46,716.	
	Continued next slide	
58		
	Question 28: What level of services are required at the IAES?	
	required at the INEO:	
	"For example, it would not generally be feasible	
	for a child removed for disciplinary reasons to	
	receive every aspect of the services that a child would receive if in his or her chemistry or	
	auto mechanics classroom as these classes	
	generally are taught using a hands-on component or specialized equipment or	
	facilities." Id.	
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	Question 28: What level of services are	
	required at the IAES?	
	Replicate the entire IEP in IAES? No.	
	ED appears to interpret the statute as requiring	
	that required services during disciplinary	
	removals be provided in conformity with the child's IEP "to the extent appropriate to the	
	circumstances." Id.	
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Question 28: What level of services are required at the IAES? • These are individualized determinations. "Section 300.530(d) clarifies that decisions regarding the extent to which services would need to be provided and the amount of services that would be necessary to enable a child with a disability to appropriately participate in the general curriculum and progress toward achieving the goals on the child's IEP may be different if the child is removed from his or her regular placement for a short period of time." Commentary, p. 46716 61 Question 28: What level of services are required at the IAES? • These are individualized determinations. "For example, a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under §300.530(g) or §300.532 and not performing at grade level." Id. 62 Question 29: When are IAES services inappropriate? • Inadequate hours of instruction. Windemere Park Charter Academy, 111 LRP 1872 (SEA MICH 2010). - The student (OHI for ADHD & SLD) was provided with 75 minutes of instruction three days per week in IAES. - "The student is not receiving anything near the educational services that his [IEP] determined he needed and that he was receiving prior to his expulsion."

Services were not provided daily, and not all core

subjects were covered in each instructional session.

Question 29: When are IAES services inappropriate?

- Lack of related services. McGraw Cent. Sch. Dist., 49 IDELR 295 (SEA NY 2007).
 - The student had an SLD, but exhibited significant behavior problems, including skipping, fighting, and insubordination.
 - Two hours per day of tutoring were sufficient during the IAES as he was capable of independent work
 - BUT the school failed to provide counseling (provided bi-weekly in his IEP) to address the student's significant behavioral needs.

64

Question 29: When are IAES services inappropriate?

- No individualized determination of services.
 Montgomery County Bd. of Educ., 49 IDELR 119 (SEA ALA 2007).
 - "By means of his IEP Petitioner is entitled to 250 minutes of special education instruction a week in math and 250 minutes of special education instruction a week in reading.
 - School had an informal policy of limiting duringexpulsion services to three or four hours per week

 Hearing officer also found significant gaps in the implementation of the services at home.

65

Question 29: When are IAES services inappropriate?

- Work packets aren't services. Upper Lake Union High Sch. Dist., 47 IDELR 89 (SEA CAL 2006).
 - During her 2-month expulsion, a California teenager expelled for smoking marihuana at school was sent a packet of work and told that she could call staff on the phone if she needed help with the material.
 - The hearing officer concluded that the school provided no educational services during expulsion.

Question 29: When are IAES services inappropriate? • Lack of transportation services. Celina ISD, 59 IDELR 26 (SEA TX 2012). - By policy, parents are required to transport students to the JJAEP (a Texas IAES req'd by state law in large counties) which was located further from the home than the student's home campus. - No public transportation was available. - The student had never needed, nor received transportation services from the district, and the child's single parent was unable to transport without 67 jeopardizing his employment. Question 29: When are IAES services inappropriate? • Lack of transportation services. Celina ISD, (cont'd) - Lacking transportation, the student missed instruction at the IAES & truancy charges were filed. - "The uncontroverted facts establish that Student had no need for transportation as a related service until Student was placed at the JJAEP. However, once student was assigned to JJAEP the changed circumstances called the ARD to consider student's need for transportation as a related service in order to access the educational services at the JJAEP and 68 continue making progress on student's IEP goals. Question 30: Does LRE matter when determining the IAES? • No. "The Act does not require that children with disabilities suspended or expelled for disciplinary reasons continue to be educated with children who are not disabled during the period of their removal." Commentary to 300.114, p. 46586.

Continued next slide....

Question 30: Does LRE matter when determining the IAES?

"We believe it is important to ensure that children with disabilities who are suspended or expelled from school receive appropriate services, while preserving the flexibility of school personnel to remove a child from school, when necessary, and to determine how best to address the child's needs during periods of removal and where services are to be provided to the child during such periods of removals, including, if appropriate, home instruction." *Id.*

70

Question 31: So an "expelled" IDEA student isn't cut off from services? Correct.

- She is expelled from the campus, but not from public education or FAPE.
 - Expulsion does not destroy the IDEA obligation of the LEA that did the expelling.
 - After the 10th removal day, expelled IDEA kids must receive services somewhere from the LEA that expelled them.
 - Those services must enable continued participation in the regular curriculum and progress toward the student's IEP goals.